Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES B. JONES, SR.,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Ohio state courts improperly deprived Petitioner of his federal right to jury determination under the Federal Employer's Liability Act, 45 U.S. C. § 51 *et seq*., by setting aside the jury's verdict under Ohio law, rather than applying the federal standard established by this Court in *Lavender v. Kurn*, 327 U.S. 645 (1946).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James B. Jones, Sr. ("Jones") respectfully petitions this Court to issue a writ of certiorari to the Ohio Supreme Court.

OPINIONS BELOW

The opinions of the Ohio Supreme Court are reported at 790 N.E.2d 1208 (Ohio 2003) and 99 Ohio St. 3d 1547 (Ohio 2003), and are also reproduced in the Petition Appendix ("Pet. App.") at pp. A-1 through A-3. The Ohio Court of Appeals' opinion is reported at 2002 Ohio 3412 (Ohio 2002), and is also reproduced in Pet. App. A-4 through A-10. The Court of Common Pleas' opinion is unpublished and, therefore, is reproduced in Pet. App. A-11 through A-22.

JURISDICTION

The order of the Ohio Supreme Court was entered on September 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provisions of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § § 51, 56, are reproduced in Pet. App. A-32, A-33.

STATEMENT OF THE CASE

Jones filed suit against the Norfolk Southern Railway Company ("Norfolk") under FELA for repetitive trauma to his back. Norfolk had a duty to provide him a safe workplace and sufficient manpower. At trial, Jones established that Norfolk knew or should have reasonably foreseen that his back injury was likely given Norfolk's knowledge of the risks associated with

his job. In fact, the trial court determined that Norfolk knew of both "the risks inherent in the heavy work conducted by Mr. Jones," and of "the risk of *back* injury posed by work ordinarily taken on by [Jones]." Pet. App. A-21, A-18 (emphasis added). Jones next established that Norfolk breached its duties by allowing Jones to work short-handed, and offering insufficient "safety huddles." Finally, Jones established, by way of expert medical testimony, that Norfolk's negligence caused *in whole* or *in part* his repetitive back injury. At the close of Jones' case, Norfolk moved for directed verdict, and the trial court properly denied its motion. Pet. App. A-23 through A-30. Under FELA, a court must submit a case to the jury if there is even the slightest evidence of negligence on the part of the railroad. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).

At the close of the trial, Norfolk renewed its motion for directed verdict. Pet. App. A-31. Once again, the trial court properly denied its motion. *Id.* The jury returned a verdict in favor of Jones for $1.4 million on June 5, 2001. Pet. App. A-5.

Norfolk filed post-trial motions for, *inter alia*, a judgment notwithstanding the verdict. The court, applying Ohio law, erroneously granted Norfolk's motion on November 14, 2001. Pet. App. A-11. Jones appealed to the Ohio Court of Appeals for the Sixth District, and it affirmed the trial court's decision on June 28, 2002. Pet. App. A-4. Jones petitioned the Ohio Supreme Court, and it allowed Jones' appeal on November 20, 2002. The Ohio Supreme Court, however, dismissed Jones' appeal on July 16, 2003, and subsequently denied–with two Justices dissenting–Jones' Motion for Reconsideration on September 10, 2003.

REASONS FOR GRANTING THE PETITION

This case presents an issue of critical importance to the proper administration of the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*, namely, whether a railroad employee is deprived of a *federal* right to jury determination when a state court applies state law, rather than federal, when determining whether to set aside a jury's verdict. This Court exercises its discretion to grant certiorari where a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. R. 10(c). This Court is especially "***vigilant*** to exercise its power of review in any case where it appears that the litigants have been improperly deprived of [their FELA right to a jury] determination." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 509 (1957) (emphasis added). In this case, the Ohio state courts ignored the supreme law of the land as set forth in *Lavender v. Kurn*, 327 U.S. 645 (1946). Jones requests that this Court grant certiorari and reinstate the jury's verdict, thereby safeguarding a railroad employee's remedy under FELA.

.. THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION FORBADE THE OHIO STATE COURTS FROM IGNORING THIS COURT'S GOVERNING PRECEDENT.

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State *shall* be bound thereby. . . ." U.S. CONST. art. VI (emphasis added). State courts have the coordinate authority and consequent responsibility to enforce the supreme law of the land. *Howlett v. Rose*, 496 U.S. 356, 370 (1990). Yet, the Supremacy Clause forbids state courts to dissociate

themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source. *Howlett*, 496 U.S. at 371. This principle is fundamental to a system of federalism in which state courts share responsibility for the application and enforcement of federal law. *Id.* at 372-73. Through the Supremacy Clause, this Court must assure FELA's authority in state courts. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943).

A railroad employee may file a FELA action in either federal or state court. 45 U.S.C. § 56. Although state courts apply their own procedural rules, ***federal*** law governs substantive issues. *St. Louis Southwestern Rwy. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). In order to give FELA uniform application, federal law governs the federal rights created by the Act. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 403 (1951); *Brown v. Western Rwy. Of Alabama*, 338 U.S. 294, 296 (1949); *Urie v. Thompson*, 337 U.S. 163, 175 (1949); *Brady*, 320 U.S. at 479; *Bailey v. Central Vermont Rwy. Inc.*, 319 U.S. 350, 352 (1943). This Court has firmly established that questions of sufficiency of evidence are issues of "substance" because they effect a railroad employee's federal right to a jury trial under FELA. *See Brown*, 338 U.S. at 296; *Wilkerson v. McCarthy*, 336 U.S. 53, 55 (1949); *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 602 (1945); *Bailey*, 319 U.S. at 352-54. Since the issues raised by a motion for judgment notwithstanding the verdict involve questions of "sufficiency of evidence," a court must apply federal law.

In *Dice v. Akron, Canton & Youngstown R.R. Co.*, this Court granted certiorari because the Ohio Supreme Court's decision "appeared to deviate from previous decisions of this Court that federal law governs cases arising under [FELA]." 342 U.S. 359, 361 (1951). There,

petitioner filed a FELA action in Ohio state court against the railroad for injuries he sustained. 342 U.S. at 360. The jury found in favor of the petitioner. *Id.* The trial judge, however, applying Ohio law, entered a judgment notwithstanding the verdict. *Id.* The Ohio court of appeals reversed on the ground that "under federal law, which controlled, the jury's verdict must stand because there was ample evidence to support its finding." *Id.* at 360-61. The Ohio Supreme Court reversed and sustained the trial court's action, holding that, *inter alia*, "Ohio, not federal, law governed." *Id.* at 361. Upon review, this Court reversed, and held that the trial court and Ohio Supreme Court erred, *inter alia*, by failing to recognize that petitioner's rights were to be determined by federal law, not Ohio law. *Id.* at 363.

In this case, the Ohio state courts applied Ohio law when they determined Norfolk's Motion for Judgment Notwithstanding the Verdict. Clearly, these courts either disagreed with or refused to recognize this Court's governing precedent which required them to apply federal law.

Sixty years ago, this Court recognized that the right to a jury trial was "part and parcel of the remedy afforded railroad workers under [FELA]." *Bailey,* 319 U.S. at 354. "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.* at 354; *see also Dice*, 342 U.S. at 363. Consequently, in *Brady v. Southern Ry. Co.*, this Court concluded that it must "finally" establish the necessary amount of evidence needed to support a jury's verdict in *any* FELA case. 320 U.S. at 479. In a 5-4 decision, this Court announced the following "uniform federal rule" for courts to apply in FELA cases:

> When the evidence is such that without weighing the credibility of the witnesses ***there can be but one reasonable conclusion*** as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Id. at 479-80 (emphasis added). The following year, however, this Court modified this rule in *Tennant v. Peoria & P. U. R. Co.,* which was the precursor to the landmark decision of *Lavender v. Kurn*, 327 U.S. 645 (1946). 321 U.S. 29, 30 (1944).

In *Tennant*, this Court granted certiorari "because of important problems as to petitioner's right to jury determination [under FELA] . . . ." 321 U.S. at 30. There, petitioner sued the railroad for the wrongful death of her husband, decedent, who worked as a switchman. *Id.* The question of how the victim met his death was susceptible to various answers, all somewhat conjectural because of the want of direct evidence. *Id.* The court of appeals set aside a jury verdict for petitioner holding that "there was no evidence upon which to base the jury's inference as to causation," and emphasized "other" inferences suggested by the conflicting evidence. *Id.* at 31, 34. In a 7-2 decision, this Court reversed, and held that in FELA cases:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and infer

> ences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [citations omitted] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id. at 35. In so holding, this Court reasoned that "no court is . . . justified in substituting its conclusions for those of the twelve jurors" where "probative facts" are presented which support the jury's conclusion. *Id.* at 32. "To enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial." *Id.*

In *Tennant*, this Court determined that "no reason is apparent why we should abdicate our duty to protect and guard that right in this case." *Id.* at 35-36. Echoing the resolve of *Tennant*–to protect a railroad employee's right to jury determination under FELA–this Court established a new standard for setting aside a jury's verdict in *Lavender v. Kurn*, 327 U.S. 645 (1946).

In *Lavender*, the plaintiff sued the railroad on the theory that the decedent–who was found unconscious on the ground near the railroad track with a skull fracture–had been struck by the curled end of a mail hook protruding from a mail car. 327 U.S. at 649. The jury returned a verdict for the plaintiff. *Id.* at 646. On appeal, the Missouri Supreme Court set aside the

verdict under Missouri law (which was comparable to the *Brady* standard), and concluded that "***all reasonable minds would agree*** that it would be mere speculation and conjecture to say that [decedent] was struck by the mail hook." *Id.* at 651 (emphasis added). In a 7-1 decision, this Court reinstated the jury's verdict. Despite the fact that one could have arrived at a conclusion opposite from the one reached by the jury, the state court was required to abide by the jury's verdict because there was *not* a "***complete absence of probative facts***" to support the jury's conclusion. *Id.* at 653 (emphasis added). In so holding, this Court reasoned:

> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike [decedent]. And there are facts from which it might reasonably be inferred that [decedent] was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck [decedent]. The jury having made that inference, the respondents were not free to re-litigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

Id. at 652-653. Continuing its reasoning, the Court established the standard to be applied when determining whether to set aside a jury's verdict in any FELA case:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts

> are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. ***Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear***. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Id. at 652-653 (emphasis added). Therefore, the jury, not the trial judge, and certainly not any appellate court, performs the important function of drawing and rejecting (or weighing) inferences from the evidence.

The issue before this Court is important to the administration of FELA, as evidenced by this Court's continued vigilance in protecting a railroad employee's right to a jury determination. For example, in *Wilkerson v. McCarthy,* this Court granted certiorari "because of the importance of preserving for litigants in FELA cases their right to jury trial. . . ." 336 U.S. 53, 55 (1949). There, petitioner brought a FELA action to recover damages for personal injuries. 336 U.S. at 54. The trial judge granted the railroad's motion for directed verdict. *Id.* at 55. The Utah Supreme Court affirmed. *Id.* Upon review, this Court reversed, finding that it was error to take the case from the jury because petitioner had sustained his burden of proof by presenting sufficient evidence of negligence. *Id.* at 55-65.

In his concurring opinion, Justice Douglas accounted for this Court's "stewardship" in the review of a succession of FELA cases coming to the Court from the 1943 term to date (1949). *Id.* at 70-73. From these cases, Justice Douglas observed that the criterion governing the exercise of this Court's discretion in granting or denying certiorari was "whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts had been 'respected.'" *Id.* at 70-71 (emphasis added). Additionally, he observed that the Court was restoring "the historic role of the jury in performing [its] function" in this "important class of cases," despite the fact that it had previously led the way in overturning jury verdicts for employees and, thereby, withholding "a goodly portion of the relief which Congress had provided employees." *Id.*

Similarly, in *Rogers v. Missouri Pac. R.R. Co.*, this Court granted certiorari to determine whether the Missouri Supreme Court improperly invaded the function and province of the jury by setting aside the verdict for plaintiff. 352 U.S. 500, 501 (1957). There, petitioner brought a FELA action to recover damages for personal injuries. 352 U.S. at 501. The jury returned a verdict for petitioner. *Id.* The Missouri Supreme Court set aside the verdict concluding that petitioner's evidence did not support the jury's finding. *Id.* This Court, applying *Lavender*, reversed and held that the Missouri Supreme Court's decision had improperly invaded the jury's function because there were "probative facts" to support the jury's finding. *Id.* at 504.

In its reasoning, the Court observed that certiorari was granted in such a relatively large percentage of FELA cases because lower courts "persistently deprive litigants of their right to a jury determination." *Id.* at 510. Additionally, the Court emphasized its "obligation

to effectuate [Congress' intent] by granting certiorari to correct instances of improper administration of [FELA], and to prevent its erosion by narrow and niggardly construction." *Id.* at 509. The Court further emphasized that the right to jury determination was an integral part of the Congressional scheme, under which the verdict of the jury was decisive. *Id.* at 510.

Unvarying, in *Basham v. Pennsylvania R. Co.*, this Court granted certiorari to determine whether the New York state courts improperly invaded the function and province of the jury by setting aside the verdict for plaintiff. 372 U.S. 699 (1963). There, petitioner brought a FELA action to recover damages for personal injuries. 372 U.S. at 699. The trial court set aside the jury's verdict for petitioner, and the appellate courts affirmed. *Id.* This Court, applying *Lavender*, reversed and held that since there were "probative facts" to support the jury's finding "it was error for the New York trial and appellate courts to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury." *Id.* at 700; *see also Dennis v. Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208 (1963) (holding that, under *Lavender*, the state court erred by setting aside jury's verdict for employee because, despite conflicting evidence, there were probative facts to support the conclusion reached).

The essence of the jury's function is to select from conflicting inferences and conclusions that which the jury considers most reasonable. *Tennant*, 321 U.S. at 35. A court ***cannot*** re-weigh the evidence and set aside the jury's verdict merely because it might draw a contrary inference or feel that another conclusion is more reasonable. *Lavender*, 327 U.S. at 653; *Tennant*, 321 U.S. at 35. Moreover, a court should not assume that in determining questions of negligence the jury

will fall short of a fair performance of its constitutional function. *Wilkerson*, 336 U.S. at 62. Therefore, an appellate court's function is exhausted where there is an evidentiary basis for the jury's verdict. *Lavender*, 327 U.S. at 653. In other words, a court may only set aside the jury's verdict where there is a complete absence of probative facts to support the jury's conclusion. *Id.*

In this case, the Ohio state courts ignored *Lavender* and, instead, applied Ohio law when determining whether to set aside the jury's verdict. Applying Ohio Civil Procedure Rule 50 and relying upon Ohio case law[1] for guidance, the trial court set aside the jury's verdict holding that "***reasonable minds could [only] conclude*** that the Railway undertook a duty to protect its employees . . . ." Pet. App. A-18 (emphasis added). Likewise applying Ohio Civil Procedure Rule 50 and relying upon Ohio case law[2] for guidance, the Ohio court of appeals determined that:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue ***reasonable minds could come to but one conclusion*** upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

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[1] *Posin v. A.B.C. Motor Court Hotel, Inc.*, 344 N.E.2d 334 (Ohio 1976) and *Creps v. McCoy*, 2001 Ohio App. LEXIS 3251, *10-11 (July 20, 2001).

[2] *Texler v. D. O. Summers Cleaners & Shirt Laundry Co.*, 693 N.E.2d 271, 273 (Ohio 1998).

Pet. App. A-6 (emphasis added). As a result, the court of appeals affirmed the trial court's judgment, and held that "***reasonable minds could only conclude*** that appellee did not breach [its] duty . . . ." Pet. App. A-9 through A-10 (emphasis added).

Remarkably, the Ohio standard (reasonable minds could come to but one conclusion) parallels both the *Brady* standard (there can be but one reasonable conclusion) and the Missouri standard (all reasonable minds would agree), which this Court replaced and/or rejected in *Lavender*. Despite that, the Ohio state courts applied the Ohio standard anyway. Although Norfolk argued that these standards were virtually the same as the *Lavender* standard, the *Lavender* opinion itself is proof that there ***is*** a crucial difference.

Unlike Ohio's standard, the *Lavender* standard was specifically designed to safeguard a railroad employee's right to a jury determination under FELA. As a result, a court's analysis under *Lavender* simply consists of determining whether there are ***any*** probative facts to support the jury's conclusion. Where there are such facts, a court must abide by the jury's conclusion otherwise it improperly deprives the railroad employee of his federal right to jury trial. *Id.*

The issues of negligence and causation are questions of fact *for the jury* to decide. *Rogers*, 352 U.S. at 509, 510. FELA has relaxed standards of proof regarding both of these issues. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996). In fact, a railroad employee's burden is significantly lighter than it is in an ordinary negligence action. *Rogers*, 352 U.S. at 506; *Nelsen v. Research Corp. of Univ. of Hawaii*, 805 F.Supp. 837, 848 (D. Hawaii 1992) (recognizing in a Jones Act case that the legal causation burden under FELA and

the Jones Act is minimal). FELA expressly imposes liability upon a railroad for any injury due in whole or in part to its negligence. 45 U.S.C. § 51. Consequently, a court must submit a case to the jury if there is *any* probative evidence to support a finding of even the slightest negligence on the part of the railroad. *Rogers*, 352 U.S. at 506.

At trial, Norfolk did not dispute that it had a duty to provide Jones a safe workplace and sufficient manpower. Jones then established that Norfolk knew or should have reasonably foreseen that his back injury was likely given Norfolk's knowledge of the risks associated with his job. In fact, the trial court determined that Norfolk knew of both "the risks inherent in the heavy work conducted by Mr. Jones," and of "the risk of *back* injury posed by work ordinarily taken on by [Jones]." Pet. App. A-21, A-18 (emphasis added). Jones next established that Norfolk breached its duties by allowing Jones to work short-handed, and offering insufficient "safety huddles." Finally, Jones established, by way of expert medical testimony, that Norfolk's negligence caused in whole or in part his repetitive back injury.

Because there were probative facts to support the jury's conclusion that Norfolk was negligent, and that its negligence caused in whole or in part Jones' injury, the Ohio state courts were required, under *Lavender*, to abide by the jury's conclusion. Clearly, these courts either disagreed with or refused to recognize this Court's governing precedent. Consequently, the Ohio state courts erroneously set aside the jury's verdict and, therefore, improperly deprived Jones of his federal right to a jury determination under FELA.

CONCLUSION

The petition for writ of certiorari should be granted because of the importance of preserving a railroad employee's right to a jury determination under FELA.

Respectfully submitted,

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APPENDIX

Jones v. Norfolk S. Ry. Co.

2002-1324.

SUPREME COURT OF OHIO

99 Ohio St. 3d 1547; 2003 Ohio 4671; 2003 Ohio LEXIS 2366

September 10, 2003, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Lucas App. No. L-O1-1490, *2002 Ohio 3412*. Reported at *99 Ohio St.3d 238, 2003 Ohio 3392, 790 N.E.2d 1208. Jones v. Norfolk S. Ry. Co., 99 Ohio St. 3d 238, 2003 Ohio 3392, 790 N.E.2d 1208, 2003 Ohio LEXIS 1840 (2003)*

JUDGES: F.E. Sweeney and Pfeifer, JJ., dissent. Resnick, J., not participating.

OPINION:

RECONSIDERATION OF PRIOR DECISION

On motion for reconsideration. Motion denied.

F.E. Sweeney and Pfeifer, JJ., dissent.

Resnick, J., not participating.

JONES,
APPELLANT,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
APPELLEE.

No. 2002-1324

SUPREME COURT OF OHIO

99 Ohio St. 3d 238; 2003 Ohio 3392;
790 N.E.2d 1208; 2003 Ohio LEXIS 1840

June 3, 2003, Submitted

July 16, 2003, Decided

SUBSEQUENT HISTORY: As Corrected August 12, 2003. Reconsideration denied by *Jones v. Norfolk S. Ry. Co., 2003 Ohio LEXIS 2366 (Ohio, Sept. 10, 2003)*

PRIOR HISTORY: APPEAL from the Court of Appeals for Lucas County, No. L-01-1490, *2002 Ohio 3412. Jones v. Norfolk S. Ry. Co., 2002 Ohio 3412, 2002 Ohio App. LEXIS 3455 (Ohio Ct. App., Lucas County, June 28, 2002)*

DISPOSITION: Appeal dismissed as improvidently allowed.

COUNSEL: Pratt & Tobin, P.C., Robert W. Schmieder and Christie R. Schmieder; and Mary Patricia Toth, for appellant.

Robison, Curphey & O'Connell and David W. Stuckey, for appellee.

JUDGES: MOYER, C.J., VUKOVICH, F. E. SWEENEY, PFEIFER, LUNDBERG STRATTON,

O'CONNOR and O'DONNELL, JJ., concur.

JOSEPH J. VUKOVICH, J., of the Seventh Appellate District, sitting for RESNICK, J.

OPINION: **[*238] [***1209] [**P1]** The appeal is dismissed, sua sponte, as having been improvidently allowed.

MOYER, C.J., VUKOVICH, LUNDBERG STRATTON, O'CONNOR and O'DONNELL, JJ., concur.

JOSEPH J. VUKOVICH, J., of the Seventh Appellate District, sitting for RESNICK, J.

James B. Jones, Sr., Appellant

v.

Norfolk Southern Railway Company, Appellee

Court of Appeals No. L-01-1490

COURT OF APPEALS OF OHIO,

SIXTH APPELLATE DISTRICT,
LUCAS COUNTY

2002 Ohio 3412; 2002 Ohio App. LEXIS 3455

June 28, 2002, Decided

SUBSEQUENT HISTORY: [**1] Appeal granted, Motion granted: *Jones v. Norfolk S. Ry., 2002 Ohio LEXIS 2862* (Ohio Nov. 20, 2002). Appeal granted by, Motion granted by *Jones v. Norfolk S. Ry., 97 Ohio St. 3d 1460, 2002 Ohio 6248, 778 N.E.2d 1051, 2002 Ohio LEXIS 2862 (2002)*

Appeal dismissed by, Review improvidently allowed by *Jones v. Norfolk S. Ry. Co., 99 Ohio St. 3d 238, 2003 Ohio 3392, 2003 Ohio LEXIS 1840 (2003)*

PRIOR HISTORY: Trial Court No. CI-00-1636.

DISPOSITION: Trial court's judgment was affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: Robert W. Schmieder, Christie R. Schmieder, E.J. Leizerman, and Mary Path Toth, for appellant.

David W. Stuckey, for appellee.

JUDGES: Melvin L. Resnick, J., Richard W. Knepper,

J., Mark L. Pietrykowski, P.J., CONCUR.

OPINION BY: Melvin L. Resnick

OPINION: DECISION AND JUDGMENT ENTRY

RESNICK, M.L., J.

[*P1] This cause is before the court on appeal from a judgment of the Lucas County Court of Common Pleas granting a judgment notwithstanding the verdict to appellee, Norfolk Southern Railway. Appellant, James B. Jones, Sr., appeals that judgment and asserts the following assignment of error:

[*P2] "THE TRIAL COURT ERRED IN GRANTING NORFOLK'S MOTION FOR A JUDGMENT NOTWITH-STANDING THE VERDICT BECAUSE THE JURY'S CONCLUSION WAS NOT OUTSIDE THE POSSIBILITY OF REASON."

[*P3] Appellant instituted the present action pursuant to the Federal Employers' Liability Act ("FELA"), Section 51 et seq., Title 45, U.S. Code, which allows a railroad employee who is injured during the course of his or her employment to bring suit against his or her employer. Under FELA, the employee must plead and prove that the injury is the result, [**2] in whole or in part, of the negligence of any officer, agent or employee of the railroad. *Vance v. Consol. Rail Corp. (1995), 73 Ohio St.3d 222, 227, 652 N.E.2d 776.*

[*P4] In the case before us, appellant claimed that the railroad negligently failed to (1) provide a reasonably safe working environment; (2) furnish sufficient manpower to perform the assigned task; (3) provide safe and suitable tools to perform the assigned task; and (4) provide reasonably safe methods of work. A jury trial was held on these issues. The jury returned a verdict in favor of appellant, awarding him $ 1.4 million.

[*P5] Appellee, however, filed a motion for a judgment notwithstanding the verdict or in the alternative, a motion for a new trial or for remittitur. In granting the motion for a judgment notwithstanding the verdict, the trial court found that appellant failed to offer even a scintilla of evidence showing that appellee breached a duty of care to appellant. The court held that as a consequence of its ruling, the motions for a new trial and remittitur were moot.

[*P6] Appellant asserts, in his sole assignment of error, that the jury verdict was not outside the [**3] possibility of reason because appellant offered, at a minimum, slight evidence that appellee was negligent and that this negligence, in whole or part, caused his back injury.

[*P7] The standard for granting a motion for judgment notwithstanding the verdict or in the alternative for a new trial pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A). *Texler v. D.O. Summers Cleaners & Shirt Laundry Co. (1998) 81 Ohio St.3d 677, 679, 693 N.E.2d 271.*

[*P8] "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determina-tive issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." Civ.R. 50(A)(4).

[*P9] When considering the motion for a judgment notwithstanding the verdict, a court must "neither consider the weight of the evidence nor the credibility

of the witnesses." *Texler v. D.O. Summers Cleaners & Shirt Laundry Co., 81 Ohio St.3d at 679.* [**4] The determination of the motion is a question of law "because it examines the materiality of the evidence, as opposed to the conclusions to be drawn from the evidence." *Id. at 680* (Citations omitted.).

[*P10] Appellant, who was thirty-nine years of age at the time of trial, began working for appellee in 1990 in "carpentry bridge and building," better known as "B&B." In this trade, railroad employees engage in the maintenance and repair of railroad bridges and buildings and in carpentry work. The job requires the use of heavy equipment, such as air hammers and cutting torches, and the handling of large pieces of concrete and other materials, including large wooden forms weighing approximately 140 pounds. The facts offered at the trial of this matter reveal that the B&B employees, who work in five man crews, engage in "constant" twisting and bending motions, often while handling the heavy equipment and materials.

[*P11] Nonetheless, the record of this cause also reveals that B&B employees are allowed to work at their own pace, take breaks whenever they choose and, if the crew is short one man, frequently are combined with another crew for the day. Furthermore, [**5] coworkers are available to aid in the lifting of the heavier materials. In addition, the record discloses that the workers were required to attend monthly safety meetings (Later in appellant's employment, these were supplanted by daily safety discussions) and receive daily job briefings. In these meetings and briefings, the safety rules are discussed, crew members are informed of the particular tasks to be performed and are told how to safely perform those tasks. Emphasis is placed on the way to lift materials and equipment to avoid injury, the

proper posture for performing the task, how to handle the equipment and the like.

[*P12] It is undisputed that, in December 1997, appellant underwent surgery for the removal of disc material extruding from two herniated discs in his back. The fact that appellant suffered pain both before and after this surgery and was treated for pain by various methods over the next two years is also undisputed. The dispute in this case centers on whether appellee was negligent in this instance and whether that negligence, if any, caused the herniated discs.

[*P13] "To prevail on a FELA claim, a plaintiff must 'prove the traditional common law [**6] elements of negligence: duty, breach, foreseeability, and causation." *Adams v. CSX Transp., Inc. (C.A. 6, 1990), 899 F. 2d 536, 539*, quoting *Robert v. Consol. Rail Corp. (C.A. l, 1987), 832 F.2d 3, 6.* In the Sixth Circuit, the employee must present more than a scintilla of evidence on the elements of his or her claim to create a jury question, "but not much more." *Aparico v. Norfolk & Western Ry. Co. (C.A. 6, 1996), 84 F.3d 803, 810.* However, while FELA is construed liberally in favor of a railroad employee, it is not a workers' compensation statute. *Consolidated Rail Corp. v. Gottshall (1994), 512 US. 532, 543, 129 L. Ed. 2d 427, 114 S. Ct. 2396.*

[*P14] "A railroad has a duty to use reasonable care in furnishing its employees with a safe place to work" see *Atchison, Topeka and Santa Fe Ry. Co. v. Buell (1987), 480 US. 557, 558, 94 L. Ed. 2d563, 107 S. Ct. 1410*, and to afford such protection against known dangers as can be expected from a person exercising ordinary care under those circumstances, see *Aparico v. Norfolk & Western Ry. Co. 84 F 3d at 810-811.*

[*P15] In viewing the evidence adduced in the present

case in a light [**7] most favorable to appellant, we can only conclude that he failed to offer even a scintilla of evidence tending to show that appellee breached any duty to provide a reasonably safe workplace for the B&B crew and/or failed to provide protection from known dangers. Even though it is undisputed that the crew maintaining and repairing bridges engages in strenuous, difficult work, this fact, in and of itself, is insufficient to establish a breach of duty. To find it sufficient would be tantamount to imposing strict liability on an employer. See *Williams v. Long Island R.R. (C.A. 2, 1999), 196F.3d 402, 406* (FELA is not a strict liability statute and the fact that an employee is injured is not proof of negligence).

[*P16] On the other hand, evidence was offered to show that appellee provided the B&B crew with safety information and methods of performing their jobs that would help prevent injury from known dangers, e.g., the lifting of heavy objects, the use of equipment such as air hammers. The fact that the crew sometimes worked with only four men while one of their number was on vacation is insufficient, standing alone, to show even the slightest negligence on the [**8] part of appellee. That is, appellant failed to offer any evidence that the absence of one worker on some occasions precluded the crew from accomplishing its tasks in the usual and customary way. *Blair v. Baltimore & Ohio R.R. (1945), 323 U.S.. 600, 604-605, 89 L. Ed. 490, 65 S. Ct. 545* (Part of the railroads's duty to ensure a safe work environment is to provide workers with sufficient manpower to accomplish assigned tasks). Furthermore, there is absolutely no evidence in the record of this case tending to demonstrate that tools and equipment used by the B&B crew were unsafe or unsuitable for the assigned tasks.

[*P17] Accordingly, reasonable minds could only

conclude that appellee did not breach the duty to furnish appellant with a reasonably safe work environment, and the trial court did not err in granting appellee's motion for a judgment notwithstanding the verdict. Appellant's sole assignment of error is found not well-taken.

[*P18] The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant, James B. Jones, Sr., is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

Melvin L. Resnick, J.

Richard W. Knepper, **[**9]** J.

Mark L. Pietrykowski, P.J.

CONCUR.

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

James B. Jones, Sr.,
Plaintiff,

vs.

Norfolk Southern Railway Company,
Defendant.

Case No. CI0200001636

OPINION AND JUDGMENT ENTRY

Hon. Richard B. McQuade
Visiting Judge

November 15, 2001, Filed

This Federal Employer Liability Act ("FELA") case is before the Court on three alternative post-trial motions of the defendant, Norfolk Southern Railway Company ("the Railway"). The Railway denominates these motions as: "Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative Motion for a New Trial or in the Alternative Motion for Remittitur." Upon review of the pleadings, memoranda of the parties, transcript of the trial proceedings, other evidence, and applicable law, the Court finds that the Railway's motion for judgment notwithstanding the verdict should be granted.

I. *FACTS*

For the purpose of ruling on the instant motions only, and after viewing the evidence and any related inference in a light most favorable to the nonmovant, the Court finds the following to be established facts.

The plaintiff, James Jones, began his employment

for the Railway in 1990. He was assigned to a five-member bridges and building crew ("B&B crew") which maintained, repaired, and constructed bridges and road beds for the Railway. This heavy and physically demanding work involved setting-up scaffolding, dismantling portions of old bridges, drilling holes into concrete, assembling steel reinforcement structures, constructing and carrying one-hundred and forty pound "forms" into which concrete would be poured, pouring concrete, carrying and using hand tools weighing upwards of ninety pounds, and undertaking other related tasks. Coworkers were available to help each other if necessary to move heavy objects. (Trial Transcript ["Tr.__"] pp.114-116.) During the Summer and early-Fall of 1997, Mr. Jones' B&B crew worked shorthanded when one man at-a-time would go on vacation. In shorthanded times, the Railway would frequently combine B&B crews when needed. (Tr. 72, 81.) As a B&B crew member, Mr. Jones worked four ten-hour days, controlled the pace of his own work, could take breaks when he chose, typically did not work overtime, and had medical attention available through the Railway if he desired it. (Tr.72-75.) These conditions were unchanged when the B&B crew worked shorthanded. (See *id.*)

The Railway conducted frequent safety meetings which Mr. Jones attended. (Tr.79-80, 114-116.) In these meetings, the attendees discussed how to do the job safely, how to watch out for colleagues, how to lift items safely, and how to handle equipment and materials safely. (Tr.76-77, 114-117.)

Sometime between July and August 1997, Mr. Jones began to experience pain in the lumbar region of his back. Mr. Jones did not report his back pain to the Railway until November 1997. (Tr.120-121.) Sometime earlier, in October 1997, a colleague of Mr. Jones',

named Nathan Gardner, notified the Railway that Mr. Gardner had sustained a thoracic spine injury in a specific single-trauma incident in September 1997 while on the job. (Tr.96.) In late October 1997, Mr. Jones went to see his own doctor, Dr. Walz, because of the pain. Then in November, upon Dr. Walz's referral, Mr. Jones sought treatment from Dr. Arata who is a back specialist. (Arata Depo. p.7.) Dr. Arata performed surgery on Mr. Jones in early December 1997. Arata Depo. p.11.) In the year following the surgery, Mr. Jones sought pain-relief treatment from Drs. Cremer and Bojrab for renewed post-operative pain. (Cremer Depo. pp-9-10; Bojrab Depo. p.6.)

The doctors diagnosed Mr. Jones as having degenerative disc disease and a ruptured disk at the L4-5, L5-S1. level. (Arata Depo. p.9; Cremer Depo. p.32; Bojrab Depo. p.21-22.)[1] Based on Mr. Jones' own reports and descriptions, his doctors determined that the back problems were caused, at least in part, over time by the "repetitive labor"[2] that Mr. Jones did on the B&B crew. (Arata Depo. pp.7, 26, 28-29; Cremer Depo. pp.32, 39; Bojrab Depo. pp.21-22, 25-26.) Mr. Jones told his doctors that his injury was not the result of one specific incident. (Arata Depo. p.7; Cremer Depo. p.35; see, also, Tr.70, 87.) Dr. Arata performed surgery on Mr. Jones in early December 1997. (Arata Depo. p.12.) On February 25, 1998, at a follow up visit, Dr. Arata recommended that Mr. Jones begin light-duty work. (Arata Depo. p.19.) At the April 15, 1997 appointment, when Mr. Jones was experiencing only minor post-operative back an leg pain, Dr. Arata recommended that Mr. Jones

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[1] Mr. Jones entered the deposition testimony of Drs. Arata, Cremer, and Bojrab into evidence at Mr. Jones' trial. (Tr.98.)

[2] The court will refer to this type of back injury as a "repetitive-trauma" or "cumulative-trauma" injury.

return to regular-duty work at the Railway. (Arata Depo. p.22.) Dr. Arata thought that it was safe for Mr. Jones to return to his B&B crew duties without restrictions. (Arata Depo. p.12; Exh.C.)

Mr. Jones filed this FELA action against the Railway to recover, for his repetitive-trauma back injury. At trial, the jury returned a verdict in favor of Mr. Jones. The Railway timely filed the instant post-trial motions.

II. *MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT*

A. STANDARD

A Civ.R. 50(B) motion for judgment notwithstanding the verdict presents only a question of law which does not entail a weighing of the evidence or an assessment of the credibility of the witnesses. *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, syllabus. Any evidence established at trial or otherwise in the record is to be construed most strongly in favor of the party against whom the motion is made; where reasonable minds could reach different conclusions on this evidence, the motion must be denied. *Creps v. McCoy* (July 20, 2001), Wood App. No. WD-00-078, 2001 Ohio App. Lexis 3251, unreported, *10-11, citing *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275. "The standard of review for a Civ.R. 50(B) motion for judgment notwithstanding the verdict is the same as that to be applied on a [Civ. R. 50 (A)] motion for a directed verdict." *Creps v McCoy, supra,* 2001 Ohio App. Lexis 3251, unreported, *10.

A jury question is created in an FELA. case if, "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. * * *. The statute expressly imposes liability

upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence." *Rogers v. Missouri Pac R.R Co.* (1957), 352 U.S. 500, 506-07, cited in *Aparicio v. Norfolk & Western Ry. Co.* (C.A.6, 1996), 84 F.3d 803, 801 (addressing directed verdict). Thus, "so long as the evidence justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury," the jury should determine liability. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d at 808. Nonetheless, when confronted with a Civ.R. 50 motion, it is proper for the trial court to determine the sufficiency of the evidence. See *id.*

B. DISCUSSION

Under the FELA, Sections 51 *et seq.*, Title 45, U.S.Code, railroad companies are liable in damages to any employee who suffers injury due, "in whole or in part," to a railroad's negligence. See Section 51, Title 45, U.S.Code.[3] See *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d at 807. Courts interpret the "in-whole-or-in-part" language of the FELA as establishing a more liberal standard of negligence than under the common law. *Maret v. CSX Transportation. Inc.* (1998), 130 Ohio App.3d 816, 820, citing *Aparicio v Norfolk & Western Ry. Co.* 84 F.3d at 807. Thus, a plaintiff must present "more than a scintilla of evidence * * *, but not much

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[3] That section reads in pertinent part as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * [for] injury or death resulting *in whole or-in part* from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, work, boats, wharves, or other equipment." (Emphasis added.)

more," to create a jury question. *Aparicio v. Norfolk & Western Ry. Co.* 84 F.3d at 810. However, " * * * the Act does not make the railroad 'the insurer' for all employee injuries." (Citation omitted.) *Metro North Commuter RR. v. Buckley* (1997), 520 U.S. 424, 429. See, also, *Inman v. Baltimore & Ohio R.R.* (1959), 361 U.S. 138, 140 (railroad employers are not the insurers of their employees) . The FELA is not a workers' compensation statute. *Ellis v. Union Pacific R. Co*, (1949), 329 U.S. 649, 653. Accordingly, under the FELA, a plaintiff is still required to produce some evidence that the defendant was negligent. *Schaefer v. Union Pacific RR.* (D.C. Wyo.1998), 10 F. Supp. 2d 1240, 1247.

To establish an FELA claim, "[a] plaintiff must present *more than a scintilla of evidence* to prove that (1) an injury occurred while the plaintiff was working within the scope of his or her employment with the railroad, (2) the employment was in the furtherance of the railroad's interstate transportation business, (3) the employer railroad was *negligent,* and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (Emphasis added.) *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d at 810. As to the "negligence" component, the plaintiff must establish the familiar negligence elements of: duty, breach, foreseeability, and causation. *Id.*

The Railway argues that all of the evidence in this case (*i.e.* the evidence elicited at trial and the evidence contained in the record as a whole) fails to indicate that the Railway was negligent. The Railway contends that Mr. Jones failed to establish the negligence elements of breach of duty, foreseeability, and causation.

In its attack on the breach-of-duty element, the Railway specifically argues that: 1) the evidence unequivocally indicates that Mr. Jones back injury re

sulted from repetitive-trauma rather than from a single specific traumatic event; 2) Mr. Jones failed to produce evidence that the strenuous, physical components of his job were unreasonably unsafe; and 3) he produced no evidence that the Railway created an increased danger of a repetitive-trauma back injury to Mr. Jones or his coworkers by operating his B&B crew shorthanded in the Summer and late-Fall of 1997. In his response brief, Mr. Jones offers no rebuttal at all to these Railway arguments.

The duty of care owed by railroads to their employees is well-established:

> "The Supreme Court in *Urie v. Thompson* stated that railroads have a duty to furnish employees with a 'reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances.' [*Urie v. Thompson* (1949), 337 U.S. 163, 179, fn.16.] The Court continued by noting that 'ordinary care must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect * * *. It must be commensurate with known dangers.' [*Id.*] However, 'known dangers' does not mean that the injury must have occurred on a previous occasion to the same or a similarly situated worker. *Gallick v. Baltimore & Ohio R.R.* (1963), 372 U.S. 108 [, 121.]" (Citation and footnote omitted.) *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d at 810-811.

A defendant will be deemed to have breached its duty to provide a safe workplace "if it knew or should have known of a potential hazard in the workplace, and yet failed to exercise reasonable care to inform and protect its employees." *Schaefer v. Union Pacific RR.*, 10

F.Supp.2d at 1247. See, also, *Aparicio v. Norfolk & Western Ry. Co.* 84 F.3d at 811 ("a railroad breaches its duty to its employees by failing to provide a safe working environment if it knew or should have known that it was not acting adequately to protect its employees").

From the evidence in this case, reasonable minds could conclude that the Railway undertook a duty to protect its employees from both cumulative-trauma and single-trauma back injuries. The testimony of Mr. Jones' supervisor, Skip Rupert, demonstrates that the Railway knew of the risk of back injury posed by work ordinarily taken on by B&B crews. Mr. Rupert testified that the Railway had safety meetings to address how to conduct the B&B crew work safely. He also stated that the Railway often combined crews during the vacation months to provide sufficient manpower to safely tackle demanding projects. The Court finds, however, that the record is devoid of any evidence, much less "more than a scintilla of evidence," that the Railway breached any duty to Mr. Jones in relation to his cumulative-trauma back injury.

First, the mere fact that an FELA plaintiff's workload is characterized as "heavy" or the work environment as "demanding and difficult" does not establish that the defendant employer breached its duty to the plaintiff to provide a work environment that is reasonably free of risks (for cumulative-trauma injuries) unless the evidence also indicates the presence of well-acknowledged workplace dangers or that other similarly situated employees also have incurred the same or similar injuries. See *Schaefer v. Union Pacific RR* 10 F.Supp.2d at 1247; *Handy v. Union Pacific RR Co.* (Utah App-1992), 841 P. 2d 1210, 1217-1218.[4] Second,

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Footnote 4 on Next Page

in order to establish that an employer breached the duty to provide a safe workplace (with respect to cumulative-trauma injuries), the record must contain evidence signaling that the employer was aware of well-established and identifiable risk factors inherent in the work and that the employer failed to take reasonable precautions to protect the workers from those risks. See *Aparicio v Norfolk & Western Ry. Co.* 84 F.3d at 811 (finding a jury question on the issue of breach-of-duty), citing *Urie v. Thompson,* 337 U.S. at 178.[5] See, also, *Williams v. Burlington N. & Santa Fe Ry. (D.C. Kan.1998), 13 F.Supp.2d* 1125, 1130-1131; *Schaefer v. Union Pacific RR* 10 F.Supp.2d at 1247-1248; *Zarecki v. Natl. RR Passenger Corp.* (N.D.Ill.1996), 914 F.Supp.

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[4] In *Schaefer* the plaintiff was a signal maintenance man whose work involved throwing heavy switches, and lifting heavy concrete blocks and other weighty items. The *Schaefer* court concluded, as a matter of law, that the plaintiff failed to prove that the defendant employer breached any duty owed to the plaintiff for carpal tunnel syndrome because the plaintiff did not produce even a scintilla of evidence (*e.g.* the existence in the workplace of well-established and identifiable risk factors) upon which reasonable minds could conclude that the employer should have known of the danger and, thus, failed to take precautionary measures. *Schaefer v. Union Pacific RR.* 10 F.Supp.2d at 1241-1248. In *Handy*, the plaintiff was a chief crew dispatcher who worked in a busy and stressful office dispatching train crews. The court concluded that the defendant railroad was not liable an a matter of law for the plaintiff's "complete emotional and physical collapse"; the record contained only evidence of a stressful workplace and no evidence of a breach of the duty to provide a safe workplace because no other similarly situated employee became physically or mentally ill as a result of the stress. *Handy v Union Pacific RR.* 841 P.2d at 1218-1219.

[5] The *Urie* court stated: "We think that negligence, within the meaning of the [FELA], attaches if the (employer) 'knew, or by the exercise of due care should have known,' that *prevalent standards of conduct* were inadequate to protect petitioner and similarly situated employees.' (Emphasis added.)

1566. 1572. 1575.[6]

In *Aparicio,* the plaintiff developed carpal tunnel syndrome. The court concluded that a jury question existed as to whether the employer breached a duty to the plaintiff in regard to the carpal tunnel syndrome. In that case, expert testimony indicated that the employer was or should have been aware of well-established ergonomic risk factors for the syndrome and that the employer failed to take reasonable steps to ameliorate those risks in plaintiff's work setting. *Aparicio v. Norfolk & Western Ry. Co.,* 84 F.3d at 812.

In contrast to *Aparicio,* however, the *Williams, Schaefer, and Zarecki* courts concluded that not even a scintilla of evidence existed indicating either that the employers were or should have been aware of an established set of risk factors or that the employers failed to take reasonable steps to ameliorate such risks in the work places. Thus, the defendant employers were entitled to judgment as a matter of law. See *Williams v. Burlington N. & Santa Fe Ry.,* 13 F.Supp.2d at 1130-1113 (no discussion by the plaintiff's "expert" about ergonomic risk factors or appropriate remedial measures about which the employer should have known); *Schaefer v. Union Pacific RR* 10 F.Supp.2d at 1247-1248 (absent expert evidence about established risk factors, the plaintiff's complaints that items were to heavy for him to carry were insufficient to establish that the plaintiff was at risk of developing the cumulative-trauma upper-extremity injury he sustained); *Zarecki v. Natl. RR Passenger Corp.* 914 F.Supp. at 1572, 1575 (testimony by plaintiff's physician stating that plaintiff's job caused her cumulative-trauma injuries was insufficient to establish that the employer breached its duty to the plaintiff under the FELA; the

[6] All three cases distinguish *Aparicio.*

physician was not qualified as an expert in risk factors for the plaintiff's job and the plaintiff failed to offer any qualified expert testimony suggesting that a prudent employer should have known that the equipment provided for plaintiff to use and the manner prescribed for use were unsafe).

In this case, while the evidence establishes that the Railway knew of risks inherent in the heavy work conducted by Mr. Jones, the Court finds that there is a complete dearth of evidence (much less expert evidence) identifying established risk factors for the repetitive trauma back injury of which the Railway reasonably should have been aware. Additionally, not even a scintilla of evidence exists to suggest the inadequacy of the Railway's safety meetings, its work procedures, or its practice of often combining work crews (when the B&B crews were shorthanded) ; the Railway put these measures in place to protect the health of its B&B crew members. The Court also notes that the testimony of Mr. Jones, that his work caused his cumulative-trauma back injury, is insufficient to establish a breach of the Railway's duty to Mr. Jones absent testimony indicating that the Railway should have been aware of specific risk factors and that its protective measures were inadequate. See *Zarecki v. Natl. RR. Passenger Corp.*, 914 F.Supp. at 1575.[7] The record also unequivocally reflects that the Railway had no notice of any specific risk of repetitive-trauma back injury or of Mr. Jones' own back problems until late October 1997; neither Mr. Jones nor his colleague Mr. Gardner (who actually suffered a single-trauma back injury rather than a cumulative-trauma injury) told the Railway about their

[7] The *Zarecki* court also indicated that the doctrine of *res ipsa loquitur* is inapplicable to prove the employer's negligence unless evidence exists suggesting that the injury is one that ordinarily does not occur without negligence. *Id.*

back problems only after Mr. Gardner injured his own back in an accident in October 1997.

Thus, because the uncontroverted evidence indicates that the Railway had no notice of a specific risk for repetitive-trauma back injuries and that the Railway did have a safety program for its B&B crew employees, the Court finds that not a scintilla of evidence exists indicating that the Railway breached a duty of care to Mr. Jones in regard to the cumulative-trauma back injury for which he seeks recovery under the FELA.[8]

Accordingly, the Court finds that the Railway's motion for judgment notwithstanding the verdict is well-taken and should be granted. Based on the foregoing, the Court finds the Railway's motions for new trial and for remittitur to be moot.

JUDGMENT ENTRY

It is ORDERED that the defendant's motion for judgment notwithstanding the verdict is granted. It is further ORDERED that judgment is entered in favor of the defendant as a matter of law. It is further ORDERED that the plaintiff's complaint is dismissed with prejudice. The Court finds no just reason for delay.

11/14, 2001 ss//_____

Hon. Richard B. McQuade
Visiting Judge

pc. Mary Patricia Toth/Robert W. Schmieder
David W. Stuckey

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[8] Thus, the Court need not address the foresseabilty and the causation elements of Mr. Jones FELA claim.

Transcribed conclusions of law, wherein trial court denied Norfolk's Motions for Directed Verdict at the close of plaintiff's case

THE COURT: You want to call your first witness?

MR. STUCKEY: Your Honor, at this time I would like to make a motion.

THE COURT: Why don't you come up.

(Whereupon, a discussion was held at the Bench off the record.)

THE COURT: Let's take our mid-morning break, then. Remember, don't discuss this case among yourselves. Don't allow or permit anyone to discuss it with you or in your presence. Don't form or express an opinion on this case until it's finally submitted to you. See you about 10:30.

(Whereupon, the jury was excused and the following took place in Court's chambers at 10:14 a.m. :)

(Whereupon, Defendant's Exhibits A, B, C, D, and E were marked.)

MR. STUCKEY: Your Honor,

I understand that the Plaintiff has rested. At this time the railway would make a motion for a directed verdict on the issues of liability, and on some issues of damages, and the issue of liability we move on two counts.

First of all there is no — there is not sufficient evidence to send this case to the jury on the issue of whether or not this man was injured on the job. All of the doctors testified that it's possible. None of them testified that it's probable. And the answer to those

questions they all use the word possible even when asked further questions.

Further, none of those doctors are in a position to even answer that question because none of them had investigated, observed, tried to find out what it was that this man did, and to try to give an opinion to a scientific — on the scientific level that's required in court they have to have some foundation which they can answer it. They didn't know what he did. They just relied on him coming in and saying, I worked for the railroad, and that was it, and that's not enough.

So there is insufficient evidence to send this case to the jury on issue of whether an injury occurred on the job. All they can do is speculate. All the jury can do is speculate. There is nothing they could find by preponderance of the evidence that it was probable that this was the result of any railway work.

And then on the issue of negligence there is no evidence of negligence. There is just evidence that this man worked hard, and hard work is not negligence. There is nothing out — there is no standard that shows how much is too much, or this is more than one guy can handle, or any of those kind of things. There is just nothing like that.

There — all they have proven is how he did his job, and simply doing his job, — he even testified there is normal, customary manner, nothing different about this one particular job they have been talking about than any other job.

So there is nothing on which a jury could find negligence even under the very loose, in my words, standard under FELA. There is not a scintilla of evidence of negligence, just of hard work.

Then on issues of damages there is no evidence. And I don't think there is any problem on the issue of any medical expenses. I think there is no evidence of any past, present, or future medical expenses.

THE COURT: We are going to charge that they can consider.

MR. STUCKEY: That's standard, because I think the way the insurance is set up it's taken care of anyway. There is also no evidence of any wage loss in this case, past, present, or future, and it would be improper to send this case to the jury with the instruction regarding any loss of earnings because there is no evidence. Those are the points that we move on.

THE COURT: Counselor?

MR. SCHMIEDER: Okay. Can I start with the last two?

THE COURT: Sure.

MR. SCHMIEDER: I must say my Counsel for the Defendant is correct. I don't think I am entitled to anything on wage losses, and I don't think I am entitled to anything on medical expense, okay?

THE COURT: Good. He won two.

MR. SCHMIEDER: Your Honor, with regard to his argument with regard to causation and the like under the Rogers case United States Supreme Court said whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought. Judicial appraisal of the proofs to determine whether a jury questions is presented is narrowly limited to the single inquiry whether with reason the conclusion may be drawn that the negli

gence of the employer played any part at all in the injury or death.

And in the 9th Circuit case Admiral Towing vs. Woolen, which is 290 F.2nd 641 the Court said this: When the exact circumstances of causality are unknown the United States Supreme Court has fundamentally transformed traditional negligence law respecting causation by permitting the finder of fact to supply by inference many of the elements normally required to be proven by the Plaintiff or claimant. As to the how or why the accident occurred considerable speculation is permitted.

The trier of fact must be afforded substantial latitude in making this determination even though the evidence supporting it is slight. As to Defendant's negligence constituting the legal cause of the accident slight evidence is sufficient as long as the inference is that which reasonable, prudent men might reach on the basis of evidence. By use of an extention of the res ipsa loquitur principle regarding permissible inferences from unexplained events the finder of facts may infer the requisite legal causation.

What I'm saying to the Court is the Court has said because of FELA and the standards that normally one would apply with the common law are not applied in the FELA case. I think there is sufficient evidence here for which a jury can make the inference that this man's injury was job related.

All the doctors said — Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not his job-related activities might or could have caused in whole or part, you know, the degenerative disk disease which led to the rupture.

THE COURT: He says that didn't happen. I didn't

read that. He said they only testified to possibility not probabilities. Did you ask them all the questions?

MR. SCHMIEDER: Yes, I did, Your Honor.

MR. STUCKEY: Can I go grab the depositions?

THE COURT: Okay. Now, did you ask the magic question?

MR. SCHMIEDER: I did, Your Honor.

THE COURT: You want to point out where.

MR. SCHMIEDER: Okay. Let me go — the first one is Dr. Arata, and it's on page 28, and it says Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether or not the rate of work that was being performed by Jim Jones caused in whole or in part the degenerative disk disease and ruptured disk at L-4, L-5 that was operated on by you on December 2, 1997? Do you have an opinion? Yes. What is your opinion? My opinion is that anyone doing heavy repetitive strenuous-type, back-breaking-type work, whether it's in the railroad or elsewhere, they are more likely to have back problems, degenerative disks. And I think the answer to your question could it be a contributing factor, I think it could be. But I can't prove whether it was in this particular instance or not doing this type of work, I think is a good set up.

MR. STUCKEY: The quote was, I can't prove it if it was in this particular instance or not.

THE COURT: Let me see that. You didn't object to that answer, Mr. Stuckey.

MR. STUCKEY: Yes, I do. I objected to the question, do you have an opinion. Doesn't matter if I object or not anyway. This is the evidence. That's what I make my

motion on directed verdict.

THE COURT: Why would you let this be played if that's the extent?

MR. STUCKEY: I objected and Judge Doneghy overruled the objection.

THE COURT: Okay. You want to read the others?

MR. STUCKEY: But keep in mind as you listen to these people all testified as well they didn't investigate. They didn't ask questions to try to determine what the cause was.

THE COURT: I understand that, but that's a different issue.

MR. SCHMIEDER: Then I am going to read, Your Honor, from Dr. Cremer's deposition on page 31 and going to page 33.

> Doctor — I had the assumption there — well, Doctor, I would like to know if you have an opinion to a reasonable degree of medical certainty as to whether the railroad work of Mr. Jones caused in whole or in part the degenerative disk disease and ruptured disk at L-4, L-5, L-5, S-1 that was operated on by Dr. Arata on December 1, 1997. Do you have an opinion? Yes, sir. And what is your opinion? I would say within a reasonable degree of medical certainty that the degenerative disk disease and/or herniation that we have discussed would be caused at least in part by the repetitive labor that this gentleman did.

Do you want the next one?

THE COURT: Sure.

MR. SCHMIEDER: Next one is Dr. Bojrab, and it's on

page 20 at the bottom.

> Doctor, assuming those facts would you have an opinion to a reasonable degree of medical certainty as to whether or not the railroad work that Mr. Jim Jones was performing for the Norfolk & Southern caused in whole or part the degenerative disk disease and the ruptured disk at L-4-5, L-5, S-1 that was operated on by Dr. Arata on December 2, 1997? Yes. What is your opinion? My opinion would be based on the operation it's very possible that this job could cause his spine to deteriorate and disks to buldge. And is that to a reasonable degree of medical certainty? Answer, yes. It's very possible. That's not probable.

That's all he said.

THE COURT: Well, he says it's to a reasonable degree of medical certainty?

MR. SCHMIEDER: That it's very possible.

THE COURT: Well, you know you still got — even if you are right about these two you still got the one doctor who says authoritatively that it is.

MR. STUCKEY: Give me a minute on that. I think there was one other point in here. His ties in with this whole thing though that he admits he doesn't know enough later in Cross Examination, that he didn't even check things out. How can you give an opinion? It doesn't go to the — it goes to the whole issue.

THE COURT: Well, I think it goes to the weight, David. I think that goes to the weight. That's argument to the jury, and it sounds like good argument to me.

MR. STUCKEY: I respectfully disagree that it goes to the weight because there has to be something the jury

can base it on if the doctor is testifying and claiming that he's giving an opinion to a reasonable degree of medical probability and admits that he hasn't done his homework.

THE COURT: Well —

MR. STUCKEY: That's just not right to let that go to jury.

THE COURT: I think you have some fine arguments for your final argument to the jury. Your motion for directed verdict is denied.

MR. STUCKEY: That was as to the cause of the injury, but what about negligence?

THE COURT: As to all of them. Now, gentlemen, I have redone —

Transcribed conclusions of law, wherein trial court denied Norfolk's Motions for Directed Verdict at the close of trial

identified by Dr. Arata as a letter in the medical records Dr. Cremer sent to Mr. Jones.

MR. SCHMIEDER: Well, I don't know if that's — if that should go to the jury or not.

THE COURT: That's admitted.

MR. SCHMIEDER: Okay.

MR. STUCKEY: And then Defendant's Exhibit E is Safety Rule 1000.

MR. SCHMIEDER: I don't have any problem.

THE COURT: Admitted. So all exhibits are admitted save A and B which shall be redacted. Do you have any rebuttal?

MR. SCHMIEDER: No, Your Honor.

MR. STUCKEY: We renew our motion for directed verdict on issues we discussed before in chambers.

THE COURT: It's denied.

45 U.S.C. § 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 56

Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 29[illegible] Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

Historical Note

Codification. The first paragraph of this section is from Act Apr. 22, 1908.

The second paragraph of this section is from Act Apr. 5, 1910.

1948 Amendment. Act June 25, 1948, omitted provision in last sentence relating to removal of actions.

Supreme Court, U.S.
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No. 03-983

IN THE

Supreme Court of the United States

JAMES B. JONES, SR.,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Ohio state courts, in this case arising under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, properly applied the longstanding federal standard established by this Court in granting judgment notwithstanding the verdict after finding that petitioner had not offered even a scintilla of evidence of negligence?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states that the parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Respondent's stock.

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BEST AVA

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NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 25, 2000, Petitioner James B. Jones, Sr. ("Jones") filed his Complaint, alleging a claim under the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.* ("FELA"). The case was tried to a jury on June 4 and 5, 2001. During the trial, Respondent Norfolk Southern Railway Company ("Norfolk Southern") moved for a directed verdict at the close of Jones's case and at the close of all of the evidence. The trial court denied these motions.

On June 5, 2001, the jury returned its verdict in favor of Jones. Judgment was entered and journalized on June 11, 2001.

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Norfolk Southern timely filed post-trial motions, including a motion for judgment notwithstanding the verdict pursuant to Ohio Civ.R. 50, a motion for a new trial pursuant to Ohio Civ.R. 59, and a motion for remittitur.[1] In an Opinion and Judgment Entry filed on November 15, 2001, and journalized on November 16, 2001, the trial court granted Norfolk Southern's motion for judgment notwithstanding the verdict and entered final judgment in favor of Norfolk Southern. The trial court found that the motions for a new trial and for remittitur were moot.

In its Opinion and Judgment Entry, the trial court specifically found:

> ▪ The record is devoid of any evidence, much less "more than a scintilla of evidence," that Norfolk Southern breached any duty to Jones in relation to his cumulative-trauma back injury (Pet. App. A-18).
>
> ▪ There is a complete dearth of evidence (much less expert evidence) identifying established risk factors for the repetitive-trauma back injury of which Norfolk Southern reasonably should have been aware (Pet. App. A-21).
>
> ▪ Not even a scintilla of evidence exists to suggest the inadequacy of Norfolk Southern's safety meetings, its work procedures, or its practice of often combining work crews (when the B&B crews were shorthanded) (Pet. App. A-21).
>
> ▪ The record also unequivocally reflects that Norfolk Southern had no notice of any specific risk of repetitive-trauma back injury or of Jones's own back problems until late October, 1997 (Pet. App. A-21).

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[1] A copy of Ohio Civ.R. 50 is included in the Appendix. Ohio Civ.R. 59 is not included because it has no application to the issues involved in this case.

- Not a scintilla of evidence exists indicating that Norfolk Southern breached a duty of care to Jones in regard to the cumulative-trauma back injury for which he seeks recovery under the FELA (Pet. App. A-22).

The trial court's final judgment was affirmed by the Sixth District Court of Appeals of Lucas County, Ohio. The Court of Appeals found:

- Jones failed to offer even a scintilla of evidence tending to show that Norfolk Southern breached any duty to provide a reasonably safe work place for the B&B crew and/or failed to provide protection from known dangers (Pet. App. A-9).

- Jones failed to offer any evidence that the absence of one worker on some occasions precluded the crew from accomplishing its task in the usual customary way (Pet. App. A-9).

- No evidence in the record demonstrated that the tools and equipment used by the B&B crew were unsafe or unsuitable for the assigned task (Pet. App. A-9).

Jones appealed to the Supreme Court of Ohio, which allowed the appeal. Merit briefs were filed by both parties. Oral arguments were heard on June 3, 2003. On July 16, 2003, the Supreme Court of Ohio dismissed Jones's appeal, *sua sponte*, as having been improvidently allowed. On September 10, 2003, Jones's motion for reconsideration was denied.

REASONS FOR DENYING THE PETITION

The petition for certiorari is based strictly on semantics and not substance and claims a conflict with the precedent of this Court that does not exist. Jones effectively concedes that the decision below is fully consistent with *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), but stakes his petition on the implausible claim that this Court *sub silentio* overruled *Brady*

three years later in *Lavender v. Kurn*, 327 U.S. 645 (1946). That is untrue. There is no substantive distinction between *Brady* and *Lavender*, or between either of those decisions and Ohio law, and this Court has consistently reaffirmed the *Brady* standard in later decisions. Here, the state courts applied the proper federal standard, and did so correctly. Norfolk Southern's motion for judgment notwithstanding the verdict was properly granted because Jones failed to present sufficient proof upon which a jury could reasonably find the elements of negligence—breach of duty, foreseeability, and causation[2]—not because the Ohio courts applied the wrong law. In all events, this case would not be a proper vehicle for review because Norfolk Southern would prevail under any conceivable standard, given that the court of appeals (like the trial court) found that Jones did not present a "scintilla of evidence" of negligence on the part of the railroad, Pet. App. A-9 (court of appeals); Pet. App. A-18, 21, 22 (trial court).

The decisions of the Ohio courts were based upon the application of federal substantive FELA law. In *Vance v. Consolidated Rail Corp.*, 73 Ohio St.3d 222 (1995), which is cited by the Ohio Court of Appeals in its Opinion in this case, Pet. App. A-5, the Supreme Court of Ohio stated, at 227:

> What constitutes negligence for purposes of the FELA is a federal question, which does not vary under different conceptions of negligence under non-FELA state and local laws. "Federal decisional law formulating and applying the concept governs." *Urie v. Thompson* (1949), 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed.2d 1282, 1295. Generally, "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis*

[2] The trial court specifically held that Jones failed in his proof as to the element of breach of duty and deferred addressing Norfolk Southern's claim that Jones also failed in his proof as to the elements of foreseeability and causation.

> *Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303, 306. . . . As a state court, we are as capable of interpreting the FELA as a federal court would be, but we apply the same federal law as the federal courts, without regard to Ohio's negligence law. . . .

Here, the Court of Appeals quoted from Ohio Civ.R. 50, which governs motions for judgment notwithstanding the verdict and was the procedural mechanism which brought the issue of the sufficiency of evidence before the trial court. But the trial court in ruling on the Rule 50(B) motion expressly applied federal substantive FELA law, as did the court of appeals in reviewing that ruling. The trial court specifically stated:

> A jury question is created in an FELA case if, "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence." *Rogers v. Missouri Pacific R.R. Co.* (1957), 352 U.S. 500, 506-07, ... [Pet. App. A-14].

The trial court then held that under the FELA a "plaintiff must present more than a scintilla of evidence" to prove the elements of his claim, citing *Aparicio v. Norfolk & Western Ry.*, 84 F.3d 803, 810 (6th Cir. 1996), but found that "the record is devoid of any evidence, much less 'more than a scintilla of evidence,' that the Railway breached any duty to Mr. Jones in relation to his cumulative-trauma back injury." Pet. App. A-22. The court of appeals, likewise citing *Aparicio*, agreed that Jones had failed to offer a "scintilla of evidence" in support of his claim, and affirmed. Pet. App. A-9.

The decision below does not conflict in any manner with the decisions of this Court. In *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), the Court established the standard to be applied by state courts in a FELA case to determine the sufficiency of evidence to justify the submission of the case to the jury. At page 479, Justice Reed wrote:

> There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states. *Western & Atlantic R. Co. v. Hughes*, 278 U.S. 496, 498; *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U.S. 472, 474. Cf. *United Gas Co. v. Texas*, 303 U.S. 123, 143. . . . But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question. **The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury**. *Western & Atlantic R. Co. v. Hughes, supra*; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, 524. Cf. *Gunning v. Cooley*, 281 U.S. 90, 94; *Commissioners v. Clark*, 94 U.S. 278, 284. **When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict**. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

> *Galloway v. United States*, 319 U.S. 372; *Pence v. United States*, 316 U.S. 332; *Baltimore & Ohio R. Co. v. Groeger*, 266 U.S. 521, n.1; *Anderson v. Smith*, 226 U.S. 439; *Coughran v. Bigelow*, 164 U.S. 301, 307; *Gunning v. Cooley*, 281 U.S. 90, 93, note; *Seaboard Air Line v. Padgett*, 236 U.S. 668, 673; *Parks v. Ross*, 11 How. 362, 373. See IX Wigmore on Evidence (3d ed., 1940), §§2494 *et seq.* (Emphasis added)

The Ohio courts did not diverge in any respect from *Brady* in applying federal law.[3]

In *Brady*, the Court, acting in response to its charge under the Supremacy Clause, adopted a uniform federal rule for states to apply to determine the sufficiency of evidence in a FELA action. The standard set by the Court in *Brady* requires courts to analyze the evidence to determine whether the only reasonable conclusion that could be drawn from the evidence is that the plaintiff has not presented more than a scintilla of evidence to support the FELA claim. This standard was followed by the Ohio courts.

Lavender v. Kurn, 327 U.S. 645 (1946), *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957), and other Supreme Court decisions after *Brady* did not change the standard by which

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[3] The Ohio courts applied federal, not state law, but regardless there is no substantive distinction between Ohio law and the federal standard established in *Brady*. This Court in *Brady* used virtually the same language—that a verdict should be directed by the court "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict," 320 U.S. at 479—as is used in Ohio Civ.R. 50(A), which requires a directed verdict if the trial court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted." See Resp. App. 1. This is the standard applied by Ohio courts in deciding a motion for judgment notwithstanding the verdict under Ohio Civ.R. 50(B). (Resp. App. 1) *Nickell v. Gonzalez*, 17 Ohio St.3d 136 (1985), *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St. 3d 677 (1998).

courts were to analyze whether sufficient evidence had been presented to submit a case to the jury. *Brady* has not been overruled or distinguished by the Court. Jones engages in a game of semantics in an attempt to avoid the consequences of his failure of proof. But Jones cannot escape from the long-established standard requiring a trial court to apply a test of reasonableness when appraising the evidence to determine if sufficient evidence has been presented. Under *Lavender, supra*, there must be "a reasonable basis in the record" from which negligence can be inferred; Jones relies on the phrase "complete absence of probative facts" in *Lavender*, 327 U.S. at 653, but that clearly means a "complete absence of probative facts" upon which a reasonable jury could render a verdict in favor of the plaintiff, which is exactly the *Brady* standard.

If there were any doubt as to the matter, this Court in cases subsequent to *Lavender* has repeatedly used the very kind of "reasonable minds" language that Jones claims to have been discarded by this Court in *Lavender*. *See Baker v. Texas & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959) ("Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury"); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949) (noting the standard to be whether "fair-minded men might draw different inferences" from the evidence, and noting that this has long been "the established rule for trial and appellate courts"); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) ("Once there is a reasonable basis in the record for concluding that there was negligence, which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion") (citing *Brady* and *Lavender*); *see also Urie v. Thompson*, 337 U.S. 163, 175 n. 14 (1949) (citing *Brady*).

Nor did this Court's decision in *Rogers* alter the standard for review of the sufficiency of the evidence to support a jury verdict. First, in *Baker* (decided after *Rogers*), this Court

continued to adhere to its longstanding standard of review. Second, nothing in *Rogers* suggests any departure from that standard. In that case, this Court emphasized that the evidence must "justify with reason" the conclusion that negligence of the employer played any part in the producing the claimed injury. *Rogers* at 448.

In *Dessi v. Pennsylvania R.R. Co.*, 251 F.2d 149 (3rd Cir. 1958), the court analyzed the *Rogers* decision at page 151:

> The repeated use of the phrase "with reason"—it appears three times in this short paragraph [referring to *Rogers*]—is **a persuasive indication that the court intended no departure from the familiar and normal requirement of our jurisprudence**, as repeatedly stated in its own rather recent decisions, **that the party with the burden of proof must "present probative facts from which the negligence and the causal relation could reasonably be inferred**." See *Tennant v. Peoria & P. U. Ry. Co.*, 1944, 321 U.S. 29, 32, 64 S.Ct. 409, 411, 88 L.Ed. 520; *Myers v. Reading Co.*, 1947, 331 U.S. 477, 485, 67 S.Ct. 1334, 91 L.Ed. 1615; and compare the rationalization in *Lavender v. Kurn*, 1946, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916. (Emphasis added.)

As set forth in the Statement of the Case above, the Ohio courts applied a *Brady-Lavender* analysis. Both Ohio courts analyzed the evidence adduced at trial in accordance with the applicable federal standard in FELA cases. *Brady* commands that "[t]he weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." 320 U.S. at 479. Here, the trial court specifically invoked the FELA standard that "the employee must present more than a scintilla of evidence on the elements of his or her claim to create a jury question," Pet. App. A-16, (citing *Aparicio v. Norfolk & Western Ry.*, 84 F.3d 803, 810 (6th Cir. 1996). The Court of Appeals ruled that "in viewing

the evidence adduced in the present case in a light most favorable to [Jones], we can only conclude that he failed to offer even a scintilla of evidence tending to show that appellee breached any duty to provide a reasonably safe workplace for the B&B crew and/or failed to provide protection from known dangers." Pet. App. A-8, 9. Jones can hardly complain that the court of appeals applied the *Aparicio* standard, given that Jones had affirmatively urged the court of appeals to apply that standard. C.A. Brief of Appellant James B. Jones, Jr., at 14 ("only 'slight' or, more than a scintilla . . . but not much more' evidence of negligence creates a jury question on the issue of railroad liability. *Harbin*, 921 F.2d at 131; *Aparicio*, 84 F.3d at 810"). The court of appeals applied federal law, and like the trial court, correctly found that Jones failed in his proof under the federal FELA standard.[4]

Recognizing that the Ohio courts fully analyzed the sufficiency of the evidence in accordance with the standards established by the Court in *Brady, Lavender, Rogers*, and other cases, Jones's argument is reduced to its actual, but fallacious, meaning—that in a FELA case a trial court has no role in determining whether sufficient evidence has been produced to justify the submission of the case to the jury. Jones's argument is simply wrong. Courts are not just referees but have responsibility to apply law to protect parties from legally unfounded claims.

Because the Ohio courts, both at the trial and appellate levels, have conducted exhaustive analyses of the evidence presented at trial in accordance with federal substantive FELA law and have determined that reasonable minds could only conclude that Jones failed to produce sufficient evidence

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[4] The fact that the court of appeals earlier had adverted in its opinion to the state rule governing motions like this one is of no moment. The court of appeals never suggested that it was applying anything but the federal substantive rule, and in any event the state and federal standards do not diverge. See *supra* n.3.

from which a jury could find "with reason" that Norfolk Southern negligence played a part in producing the injury for which damages were sought, the Ohio courts have not improperly deprived Jones of his federal rights under the FELA. Norfolk Southern's motion for judgment notwithstanding the verdict was properly granted because Jones failed in his proof, not because Ohio courts applied the wrong law.[5]

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[5] Jones contests the rulings below that his proof of negligence was inadequate, but that factbound question has no importance outside this case and does not warrant the Court's review.

APPENDIX

APPENDIX

Civ R 50 Motion for a directed verdict and for judgment notwithstanding the verdict

(A) Motion for directed verdict

(1) When made. A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

(2) When not granted. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

(3) Grounds. A motion for a directed verdict shall state the specific grounds therefor.

(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

(5) Jury assent unnecessary. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(B) Motion for judgment notwithstanding the verdict

Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of

judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(C) Conditional rulings on motion for judgment notwithstanding verdict

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (B) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule *59* not later than fourteen days after entry of the judgment notwithstanding the verdict.

(D) Denial of motion for judgment notwithstanding verdict

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(E) Statement of basis of decision

When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement may be dictated into the record or included in the entry of judgment.

Supreme Court, U.S.
FILED
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(3)

No. 03-983

IN THE

Supreme Court of the United States

JAMES B. JONES, SR.,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONER

Although Norfolk concedes that the Ohio state courts were required to apply federal law, it ignores the fact that the Ohio state courts relied upon ***Ohio*** law when setting aside the jury's verdict in favor Jones. *See* Pet. App. A-6 through A-7, A-14. Not surprisingly, Norfolk does not even address the very reason Jones seeks certiorari in this case.

Realizing the error of the Ohio state courts, Norfolk argues that "'regardless' there is no substantive distinction between Ohio law and the federal standard established in *Brady*." Resp. Brf. p.7, n.3 (emphasis added). Thus, Norfolk argues that the Ohio state courts "did not diverge in any respect from *Brady* . . . ." Resp. Brf. p.7. The *Brady* standard, however, was a precursor to the governing *Lavender* standard, which this Court specifically designed to safeguard a railroad employee's right to a jury determination under FELA. The very outcome in this case is what this Court sought to prevent nearly sixty years ago.

Conceding *Lavender's* precedential value, Norfolk next argues that "there is no substantive distinction between *Brady* and *Lavender*, or between either of those decisions and Ohio law . . . ." Resp. Brf. p.4. The *Lavender* opinion itself, however, is proof that there ***is*** a crucial difference. In *Lavender*, this Court specifically rejected Missouri state law, which parallels Ohio law and the *Brady* standard. Unlike Ohio law and the *Brady* standard, the *Lavender* analysis simply consists of determining whether there are ***any*** probative facts to support the jury's conclusion–***period***. *Lavender v. Kurn*, 327 U.S. 645, 653-53 (1946). Where there are such facts, a court must abide by the jury's conclusion otherwise it improperly deprives the railroad employee of his federal right to jury trial.

At both the close of Jones' case and at the close of trial, the Ohio trial court determined that Jones had presented enough evidence of Norfolk's negligence to justify submission of the case to the jury. In FELA cases, a court must submit a case to the jury if there is even the slightest evidence of negligence on the part of the railroad. *Rogers v. Missouri Pac. R. R. Co.*, 352 U.S. 500, 506 (1957).[1] In other words, an employee need only produce "evidence scarcely more substantial than pigeon bone broth" to reach the jury. *Harbin v. Burlington N. Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990). The burden is "featherweight." *Ferrara v. A.& V. Fishing, Inc.*, 99 F.3d 449, 453 (1st Cir. 1996). Consequently, only "slight" or "more than a scintilla . . . but not much more" evidence of negligence creates a jury question on the issue of railroad liability. *Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 810 (6th Cir. 1996). Because Jones exceeded FELA's requisite burden of proof, the trial court properly submitted the case to the jury.

Once a case is submitted to the jury, this Court has determined (through a succession of FELA cases decided after *Brady* and resulting in the *Lavender* standard) that the essence of the jury's function is to select from conflicting inferences and conclusions that which the ***jury*** considers most reasonable. *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35 (1944). A court ***cannot*** re-weigh the evidence and set aside the jury's verdict merely because it might draw a contrary inference or

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[1] *See also Ulfik v. Metro-North Commuter R. R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991); *Brown v. CSX Transp. Inc.*, 18 F.3d 245, 248 (4th Cir. 1994); *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 685 (7th Cir. 1995); *Martinez v. Union Pac. R.R. Co.*, 82 F.3d 223, 228 (8th Cir. 1996); *Law v. General Motors Corp.*, 114 F.3d 908, 912 (9th Cir. 1997); *Missouri Pac. R.R. Co. v. Kansas Gas & Elec. Co.*, 862 F.2d 796, 800 (10th Cir. 1988).

feel that another conclusion is more reasonable. *Lavender*, 327 U.S. at 653; *Tennant*, 321 U.S. at 35. Moreover, a court should not assume that in determining questions of negligence the jury would fall short of a fair performance of its constitutional function. *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949). Thus, an appellate court's function is exhausted where there is an evidentiary basis for the jury's verdict. *Lavender*, 327 U.S. at 653. In other words, a court may only set aside the jury's verdict where there is a complete absence of probative facts to support the jury's conclusion. *Id.*

The jury's function was not respected in this case. The Ohio state courts improperly invaded the jury's function because there were probative facts to support the jury's conclusion. At trial, Norfolk never disputed that it had a duty to provide Jones a safe workplace and sufficient manpower. Jones then established that Norfolk knew or should have reasonably foreseen that his back injury was likely given Norfolk's knowledge of the risks associated with his job. In fact, the trial court concluded that Norfolk knew of both "the risks inherent in the heavy work conducted by Mr. Jones," and of "the risk of *back* injury posed by work ordinarily taken on by [Jones]." Pet. App. A-21, A-18 (emphasis added). Jones next established that Norfolk breached its duties by allowing Jones to work short-handed, and offering insufficient "safety huddles." Finally, Jones established, by way of expert medical testimony, that Norfolk's negligence caused in whole or in part his repetitive back injury.

Because there were probative facts to support the jury's conclusion that Norfolk was negligent, and that its negligence caused in whole or in part Jones' injury, the Ohio state courts were required to abide by the jury's conclusion under *Lavender*. The fact that the

Ohio state courts might have drawn a contrary inference or felt that another conclusion was "more reasonable" is irrelevant. Clearly, these courts either disagreed with or refused to recognize this Court's governing precedent. Consequently, the Ohio state courts erroneously set aside the jury's verdict and, therefore, improperly deprived Jones of his federal right to a jury determination under FELA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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